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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CR 21-00155 JD
	)	PAGES 38-68 SEALED
CARLOS E. KEPKE,	)	
	)	
Defendant.	)	
_____	)	

San Francisco, California  
Thursday, October 20, 2022

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff:

STEPHANIE M. HINDS  
United States Attorney  
150 Almaden Boulevard - Suite 900  
San Jose, California 95113  
**BY: MICHAEL G. PITMAN**  
**ASSISTANT UNITED STATES ATTORNEY**

DEPARTMENT OF JUSTICE - TAX DIVISION  
150 M Street NE - Suite 2.603  
Washington, D.C. 20002  
**BY: BORIS BOURGET, ATTORNEY AT LAW**

**(APPEARANCES CONTINUED ON THE FOLLOWING PAGE)**

REPORTED BY: Marla F. Knox, CSR No. 14421, RPR, CRR, RMR  
United States District Court - Official Reporter

**APPEARANCES:** (cont'd)

For Defendant:

GOODWIN PROCTER LLP  
601 Marshall Street  
Redwood City, California 94063

**BY: GRANT P. FONDO, ATTORNEY AT LAW**  
**DAVID R. CALLAWAY, ATTORNEY AT LAW**

GOODWIN PROCTER LLP  
620 Eighth Avenue  
New York, New York 10018

**BY: RICHARD M. STRASSBERG, ATTORNEY AT LAW**

GOODWIN PROCTER LLP  
601 South Figueroa Street - Suite 4100  
Los Angeles, California 90017

**BY: SYLVIA R. EWALD, ATTORNEY AT LAW**

## PROCEEDINGS

Thursday - October 20, 2022

2:16 p.m.

P R O C E E D I N G S

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**THE CLERK:** Calling criminal matter 21-155, United States versus Carlos E. Kepke.

Counsel, if you would please, come forward and state your appearance.

**MR. PITMAN:** Good afternoon, Your Honor, Michael Pitman for the Government. With me is Boris Bourget from the Tax Division in Washington, D.C. I'm an AUSA here in the Northern District, Your Honor.

**MR. BOURGET:** Good afternoon, Your Honor.

**MR. FONDO:** Good afternoon, Your Honor, Grant Fondo for the Defendant, Mr. Kepke. He has been excused for the appearance today. Thank you, Your Honor, for that.

With me are my colleagues Rich Strassberg, David Callaway, and Sylvia Ewald.

**THE COURT:** Okay. We have got a lot to do. Let me ask you a question. So what is the status of Mr. Kepke's health?

**MR. FONDO:** It's as described. He is 82 years old. He has got significant heart conditions. He is -- his wife also has significant health issues as well, and so his health is a significant concern.

**THE COURT:** Well, I mean, the trial is in about a

1 month.

2 **MR. FONDO:** Understand, Your Honor.

3 **THE COURT:** So, are there any restrictions on his  
4 being here?

5 **MR. FONDO:** Well, we think we will be able to get him  
6 here, yes, Your Honor. We honestly -- you know, I don't know  
7 how he is going to hold up with a trial for a month long plus  
8 trial but right now he will be able to appear.

9 **THE COURT:** Okay. I mean, it is going to be a  
10 mountain of work to get all these jurors in. I'm going to have  
11 to pick a lot because it is going to be a long trial by local  
12 standards and it's the holidays and it's flu time and, of  
13 course, it is always COVID time.

14 So I'm probably going to have to bring in over a hundred  
15 people. I don't want to do this if you are going to tell me at  
16 the end of week he can't take another day of trial for medical  
17 reasons.

18 **MR. FONDO:** Your Honor, I honestly don't know. He  
19 is -- you know, one of the reasons we have asked to excuse him  
20 is the travel issue, not only COVID but also obviously if he  
21 gets sick, it is a pretty significant issue for someone in his  
22 condition. And also being here for a month plus is a  
23 significant issue while with staying in a hotel and taking  
24 transportation back and forth to the courthouse and then  
25 obviously the stress of a trial.

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1           So I also know that there is stress leading up to a trial,  
2           so we will not play games with Your Honor or the Court. We  
3           completely understand that.

4           But I can't guarantee --

5           **THE COURT:** Well, I'm not worried about games. I just  
6           don't want to just sort of waltz into this without your getting  
7           adequate assurances from physicians that we are not going to  
8           have to pull the plug after --

9           **MR. FONDO:** Yeah.

10          **THE COURT:** -- two weeks or something.

11          **MR. FONDO:** We will -- we will get the -- we will have  
12          him see a doctor related to that. We are also happy, you know,  
13          to continue the trial, Your Honor, if you want to. I'm not  
14          sure --

15          **THE COURT:** I would prefer not to. I have this  
16          slot -- we have this whole complicated thing for getting  
17          trials. This other one was a little bit different because it  
18          is going to be super short. And we just don't have many  
19          blocks. I won't bore you with the reasons why, but we just  
20          don't at the moment. So, I mean, Government, you don't want to  
21          continue it or do you want to continue it?

22          **MR. PITMAN:** We don't want to continue it, Your Honor.

23          **THE COURT:** Yeah, and, you know, time is kind of the  
24          essence given the age of the case and the age of the Defendant  
25          and so on so...

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1           Okay. Let's start with -- we have a lot to get through.  
2           Let's start with the experts.

3                               (Pause in the proceedings.)

4           **THE COURT:** Let me get to my notes one second.

5                               (Pause in proceedings.)

6           **THE COURT:** All right. So let's start with docket 61,  
7           which is a motion to exclude the Defendant's expert Rodney  
8           Read. I just -- I'm having trouble, Mr. Fondo, understanding  
9           why the disclosures for Read were -- it is not Mr. Fondo. It  
10          is --

11          **MR. CALLAWAY:** Sorry, Your Honor, David Callaway also  
12          from Goodwin Procter.

13          **THE COURT:** Okay, David Callaway, all right. I'm  
14          having trouble understanding, Mr. Callaway, why your  
15          disclosures for Mr. Read as an expert were so untimely.

16          **MR. CALLAWAY:** Well, Your Honor, the initial  
17          disclosure was, in fact, timely, the June 3rd disclosure. The  
18          Government objected to it as being insufficient so --

19          **THE COURT:** Let me just tell you, that was correct.  
20          That was a completely deficient disclosure under Rule 16. It  
21          didn't --

22          **MR. CALLAWAY:** Fair enough, Your Honor.

23          **THE COURT:** It didn't say anything to anybody that  
24          would give the Government an adequate basis for  
25          cross-examination. So you were late. I mean, you sailed in,

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1 you know, a little placeholder on July 5th; but, I mean, then  
2 you didn't do anything until July 22nd. It is late. I'm just  
3 trying to figure out why.

4 **MR. CALLAWAY:** Your Honor, we believed that the  
5 initial disclosure for a defense expert in a case where we  
6 really don't know what the Government's case is going to be and  
7 where anything the Defense expert is going to say is  
8 necessarily somewhat contingent was sufficient; but after we  
9 met and conferred with the Government and heard their concerns  
10 about their inability to bring a Daubert, which discussion  
11 occurred in good faith very promptly after we filed our initial  
12 on June 3rd, we then supplemented on July 22nd, at the same  
13 time that we timely submitted our expert rebuttal expert  
14 disclosure.

15 So we believe that that second disclosure meets the  
16 requirement and it was -- it was tendered in good faith, and we  
17 did meet and confer with the Government and in good faith tried  
18 to address their concerns and give them what they would need to  
19 be able to bring a proper Daubert motion, which we would submit  
20 their motion to exclude filed on August 5th was, in fact, a  
21 Daubert motion.

22 **THE COURT:** I'm not sure about that. I mean, looking  
23 at that July 22nd letter you sent, which is docket number 61-2,  
24 I mean, I just -- I mean, you outline Mr. Read's opinions; but  
25 you don't give any reasons or bases for them which the rule,

1 Rule 16, requires you to do.

2 I don't -- I mean, there is nothing in here. These are  
3 all just punchlines. There is no explanation of how he reached  
4 these conclusions. And that, of course, is the main point of  
5 the disclosure so that the Government has a fair opportunity to  
6 be prepared for cross-examination and not got waylaid at trial  
7 by Mr. Read suddenly saying: "Oh, why do I think this opinion  
8 is true? Well, here are a hundred documents I reviewed" and  
9 the Government is left trying to figure out on the fly in front  
10 of a jury what to do.

11 So, where is the explanation of the bases and the reasons  
12 for the opinions in this July 22nd letter?

13 **MR. CALLAWAY:** We would submit, Your Honor, that they  
14 are included in the CV that was provided. Essentially --

15 **THE COURT:** The what?

16 **MR. CALLAWAY:** -- Mr. Read would be testifying.

17 **THE COURT:** Wait. Where are you saying they are?

18 **MR. CALLAWAY:** In the CV that was provided along  
19 with --

20 **THE COURT:** His resume?

21 **MR. CALLAWAY:** Yes, and --

22 **THE COURT:** That doesn't cite any evidence -- bases  
23 and reasons are evidence in the record that he is relying on or  
24 other evidence outside of the record that he is relying on for  
25 these opinions and you want to present to the jury. His CV



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1 doesn't say a word about that.

2 **MR. CALLAWAY:** Your Honor --

3 **THE COURT:** His CV says "I work at Baker McKenzie."

4 It doesn't --

5 **MR. CALLAWAY:** Your Honor, what I would submit that  
6 the CV says is "I'm a trust and estate lawyer. This is what I  
7 do all day every day. I have been one since 2009."

8 So he would be testifying as an industry expert of the  
9 sort of things one -- general information about the foreign  
10 non-grant or trust and specifically the bullet points that we  
11 provided in our disclosure but that those are general --

12 **THE COURT:** Okay, this is -- you are just telling me  
13 "Take my word for it. I'm an expert."

14 That doesn't fly. It doesn't fly under 702, the evidence  
15 code, or Daubert or Rule 16. You can't just say "take my word  
16 for it. I know what I'm talking about."

17 How is the Government supposed to cross-examine him about  
18 that? What you need to say is, for example, in this July 22nd  
19 letter, you know, you want Mr. Read to give the opinion, you  
20 know, about something to the effect of -- I'm just picking one  
21 out here -- it's not uncommon for a foreign trust to purchase  
22 an asset from a beneficiary which then becomes an asset of the  
23 trust.

24 There is no explanation about how he reached that  
25 conclusion and just saying "I work at Baker McKenzie as a tax

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1 lawyer" isn't enough.

2 **MR. CALLAWAY:** Your Honor, I would submit that that  
3 disclosure is analogous, indeed, to -- I didn't look at the  
4 disclosure that was made in the court -- in the case we just  
5 heard -- but the Government routinely calls narcotics experts  
6 to say in drug cases people will often engage in  
7 counter-surveillance driving to avoid detection and by training  
8 and experience they will use code words. When they are  
9 referring to kilos of heroin, they might refer to "horses" or  
10 "windows" or some other thing. And it is always very general  
11 like just like the bullet points --

12 **THE COURT:** This is beyond general. This has nothing  
13 in it in terms of support. This says literally nothing but  
14 "trust me, I'm an expert," which is patently not acceptable.  
15 Let me pause for a minute and hear from, is it Mr. Pitman?

16 **MR. PITMAN:** Yes, Your Honor, thank you. I think the  
17 Court has sort of put its finger obviously on an issue. We did  
18 our best to do our best to analyze the potential testimony; but  
19 given the absence of any real substance in disclosures, it was  
20 difficult to formulate a Daubert motion.

21 The reality is that the Court should allow pretty broad  
22 expert testimony on the subjects at issue in this case.

23 And I have, you know, no doubt that it would be possible  
24 for the Defense to put together an adequate disclosure that  
25 would provide the actual opinions and the actual bases for

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1 those opinions that would describe admissible testimony.

2 And it's just -- the fact is we are six weeks from trial  
3 now. These disclosures were due in the summer, and we are  
4 getting -- now, I think the Court is faced with the option of  
5 either giving the Defense an opportunity to supplement their  
6 disclosures or to just strike the expert, neither of which are  
7 great options at this point. So...

8 **THE COURT:** Well, let me -- I mean, there is a little  
9 bit more than that. I mean, your reply brief, which is docket  
10 number 73, you indicate that you are actually okay, given this  
11 record as it is, with Mr. Read looking at the first letter --  
12 first portion -- looking at the July 22nd letter, you are okay  
13 with him saying the first -- testifying to his opinions about  
14 the first sentence in number 1; right?

15 **MR. PITMAN:** So there is a bullet point list. Are you  
16 looking at docket 73, Your Honor?

17 **THE COURT:** No. I'm looking at docket 61-2.

18 **MR. PITMAN:** Oh, yes, Your Honor.

19 **THE COURT:** So you are okay with Mr. Read, even though  
20 he didn't give you any evidence for it, you are okay with him  
21 testifying to the opinion in the first sentence of line 1;  
22 right?

23 **MR. PITMAN:** So the -- our position is that that  
24 opinion is an opinion that was disclosed. I don't think that  
25 the bases for that opinion were disclosed, so maybe that is a

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1 nuanced point. And we would -- to the extent the Court is  
2 inclined to allow him to testify as to that opinion, I still  
3 think it would be appropriate to order -- sorry -- to order --

4 **THE COURT:** Okay, I read this as saying you are not  
5 going to live or die -- you are going to let him -- you are  
6 okay with him saying that at trial; is that right?

7 **MR. PITMAN:** Not exactly, Your Honor. And I will  
8 explain if you like.

9 **THE COURT:** Okay.

10 **MR. PITMAN:** Okay. So these are -- so his opinions  
11 appear reasonable. I don't see how helpful they will be to the  
12 jury; but without knowing what the bases are -- and I'm not --  
13 I don't need -- you know, this is the Government's disclosure,  
14 by the way -- it is over 130 pages long.

15 **THE COURT:** I looked at it.

16 **MR. PITMAN:** I just need a paragraph or two just to  
17 make sure that the bases for the opinions that the Court is  
18 about to cite that we have identified as having been disclosed  
19 properly are not whacky.

20 **THE COURT:** All right. Well, you are throwing your  
21 opponent -- your colleagues here a lifeline. I was going to  
22 exclude them. If you are willing to do that -- you will be  
23 happy if they just give you a short and sweet statement for  
24 each one of these bullet points and docket number 61-2?

25 **MR. PITMAN:** So, my position, Your Honor, is that

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1 there are some opinions that were revealed in these  
2 disclosures -- I have listed those opinions in our reply brief,  
3 which is docket number 73. There is a bullet point starting on  
4 page 3 -- I would say that those -- one, two, three, four,  
5 five, six, seven, eight -- opinions, so long as there are  
6 supplement about the bases for those opinions to make sure he  
7 is not a tax protestor or something, we would be okay with  
8 those coming in.

9 **THE COURT:** All right. Well, you can thank Mr. Pitman  
10 for his generosity because I was going to say no. I don't  
11 think you subscribed to the letter of Rule 16, but can you do  
12 that? How long do you need? We have trial starting  
13 November 28th; right? So how about the end of next week, a  
14 week from today?

15 **MR. CALLAWAY:** We will make every effort. I don't  
16 know what our expert's schedule is. And for all I know, he is  
17 on an African safari.

18 **THE COURT:** No. Counsel, let me be crystal clear.  
19 That's on you. You have got a golden opportunity here. If  
20 your man cannot make it happen, then he is not going to  
21 testify. That's your choice; okay. So I'm sorry. It is late  
22 in the day. I think Mr. Pitman has done you a tremendous favor  
23 here by letting you do this.

24 I think it is well within my discretion to exclude  
25 Mr. Read for having utterly failed to disclose any bases for

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1 his opinion as he was required to do; however, I'm willing to  
2 let you go forward with this agreement.

3 If you can't make it work, that's your issue, not mine;  
4 okay. So I will do a week from tomorrow you can get it to  
5 Mr. Pitman and the Government. Okay. That's the disposition  
6 for that motion.

7 Now, let's look at, oh, yes, okay, the Defendant's motion  
8 to preclude the prosecution's expert, Mr. Dubinsky. Okay, go  
9 ahead.

10 **MR. CALLAWAY:** Your Honor, based on the Government's  
11 opposition, it is not entirely clear how much disagreement we  
12 actually --

13 **THE COURT:** Well, I was wondering about that. Can I  
14 just jump in? No one -- we all know this, but I will just be  
15 clear. No one is going to give any legal opinion testimony.

16 Now, having said that, it's a tax case. There are tax  
17 statutes. There are tax regulations. You can certainly talk  
18 about that.

19 Talking about the law is not giving a legal opinion. I  
20 think we all appreciate that. Giving a legal opinion is he is  
21 guilty or this was patently a fraudulent offshore structure or  
22 something like that. Okay.

23 So, tell me more about why you think maybe there is  
24 nothing to see here if you were going that way.

25 **MR. CALLAWAY:** And that is where I was going,

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1 Your Honor. In the 136-page report that we received, which  
2 admittedly was not exactly on point because it was clearly done  
3 for Mr. Smith and it was re-purposed as an expert report for  
4 Mr. Kepke, and that's fine; but there are some opinions in  
5 there that are clearly legal opinions.

6 This was a grantor trust, not a foreign non-grantor trust.  
7 There are a number of opinions that are objectionable in there  
8 that we -- that we believe. And Mr. Pitman will certainly  
9 clarify that the Government is now saying: Fine, that may have  
10 been in his report but that's not something we are going to --

11 **THE COURT:** Well, the only legal conclusion I'm  
12 worried about is somebody saying that, you know, the Defendant  
13 conspired with Smith to evade taxes.

14 Anything short of that -- I don't necessarily think it is  
15 a legal opinion to say this is or is not a grantor trust. I  
16 mean, that's just sort of based on the expert's opinion. But,  
17 you know, as I understand the practices and the regulations, I  
18 would not say this is a grantor trust.

19 I don't think -- that's not a legal opinion in the sense  
20 that it is going to go to the guilt or innocence of the  
21 Defendant. That you can't do.

22 So, I mean, if you are going to say that, then I don't  
23 know what these experts are going to talk about because it is  
24 all about the tax laws.

25 **MR. CALLAWAY:** Well, Your Honor, Mr. Dubinsky is

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1 definitely, you know, a highly reputable forensic accountant.  
2 His expertise is in following the money.

3 To the extent he is going to testify about the  
4 transactions that Mr. Smith engaged in and essentially testify  
5 that Mr. Smith controlled the trust, that's all fine and well  
6 within his expertise.

7 Where we would ask the Court to draw the line is on  
8 whether he is allowed to say and "that's improper."

9 I think the "that's improper" part is the question for the  
10 jury to answer. And it seems, based on the experts that they  
11 have proffered, that the Government expects the jury  
12 instructions and only the jury instructions to tell the jury  
13 what the law is.

14 And so that if Mr. Dubinsky says: "And Mr. Smith took  
15 over the trust and did this, this, and this transaction without  
16 meaningfully consulting with the trustee," fine. He can say  
17 that. There is no evidence that he consulted with a trustee.  
18 He ordered this transaction. He bought that piece of property.  
19 All fine.

20 But if he says: "And that's improper. That makes this a  
21 grantor trust instead of a foreign non-grantor trust, so the  
22 whole thing is out the window." We would submit that goes too  
23 far. That's for the jury to decide based on the jury  
24 instructions this Court will give.

25 And that's where I think that we get -- this gets fuzzy,



1 Your Honor, frankly.

2 **THE COURT:** Mr. Pitman.

3 **MR. PITMAN:** So I disagree with Counsel and I agree,  
4 frankly, with the Court. If the jury didn't receive that kind  
5 of testimony from an expert, they would have a very hard time  
6 understanding this case.

7 The Ninth Circuit in criminal tax cases allows the parties  
8 to present right up to the line in a case like this -- the most  
9 important cases are the cases that I found most significant on  
10 this issue were *Moran*, which is a Ninth Circuit case from 2007,  
11 and *Clardy*, which is a Ninth Circuit case from 1980.

12 **THE COURT:** By the way, is *Moran* a sham?

13 **MR. PITMAN:** Yes, Your Honor.

14 **THE COURT:** I have to say, I do want to avoid words  
15 like that. I disagree that -- I just -- I think that is  
16 inflammatory and unnecessary; but anyway, I'm glad you  
17 mentioned *Moran* because I wanted to bring that up at some  
18 point, but I understand what you are -- okay, go ahead. Finish  
19 your point.

20 **MR. PITMAN:** Well, I mean, and the Court does raise a  
21 good point and this was raised in the Defense's papers as well  
22 that, you know, language matters.

23 **THE COURT:** Language does matter, yes.

24 **MR. PITMAN:** And I think the more technical terms that  
25 we will probably be using during trial are "substance over

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1 form" or "grantor, non-grantor."

2 **THE COURT:** I think that's just fine. So, look, I  
3 need to hear the details. I'm just going to have to hear -- I  
4 will be vigilant -- and, of course, you will be vigilant on the  
5 Defense side too to make objections.

6 As it stands, I'm not going to rule out Dubinsky or any of  
7 his proposed opinions at this time. I will tell you I don't  
8 think the grantor issue is an ultimate legal conclusion that  
9 the jury is going to be called on to decide with respect to the  
10 evasion of taxes such that it would be improper for either  
11 side.

12 I mean, you are going to have the same opportunity on the  
13 Defense side to say: No, this is perfectly fine trust. And I  
14 think the jury -- that's the whole point of the trial is to --  
15 you know, one of you is going to have to -- well, it is the  
16 Government's burden to show that it wasn't a perfectly fine  
17 trust; and they are going to have to get some guidance on that.

18 I'm not going to exclude it for now, but I will be  
19 listening carefully to make sure it doesn't cross the line into  
20 an impermissible instruction on the law by an expert.

21 Okay. So that takes care of that set. Now, let's do --  
22 oh, yes, Mr. Brockman.

23 **MR. CALLAWAY:** Your Honor, we have one more expert,  
24 Mr. Oertel, that I don't know if you wanted to do at the same  
25 time.

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1           **THE COURT:** Is that the tax person, the IRS?

2           **MR. CALLAWAY:** Kind of an expert.

3           **THE COURT:** I was under the impression that you-all  
4 had worked that out and there was no issue left.

5           **MR. PITMAN:** I don't think the motion was technically  
6 withdrawn, but my reading of the reply was the Defendant wasn't  
7 seeking --

8           **THE COURT:** That was my reading as well.

9           **MR. CALLAWAY:** I think that's right. The only thing I  
10 wanted to say about it is, the Government agreed to provide  
11 draft Rule 1006 disclosures by October 24th. I just wanted to  
12 confirm -- that was part of what was in the opposition and  
13 caused us to back down.

14          **THE COURT:** Let's see. Today is the 20th, yeah.

15          **MR. PITMAN:** I believe the 24th is Monday, Your Honor,  
16 and we will be getting --

17          **THE COURT:** You are on track?

18          **MR. PITMAN:** Yeah.

19          **MR. CALLAWAY:** Great. That's all I wanted to say on  
20 that. Thank you.

21          **THE COURT:** Okay. Now, let's turn to the discussion  
22 of docket number 90, Defendant's motion to exclude evidence  
23 related to Robert Brockman's tax fraud. Mr. Pitman.

24          **MR. PITMAN:** Mr. Bourget is going to handle this one.

25          **THE COURT:** Okay. Sure. Go ahead.

1           **MR. BOURGET:** I think this was the Defense's motion to  
2 exclude.

3           **THE COURT:** Tell me -- I mean --

4           **MR. BOURGET:** Sure.

5           **THE COURT:** I'm sorry. It has been a long day  
6 already. I had a long morning session too.

7           Why do you want to -- I mean, look, this is a little bit  
8 of a sideshow. I don't know what -- I don't mind some table  
9 setting. You know, I guess the idea is that Mr. Brockman  
10 introduced Smith -- Mr. Smith to Mr. Kepke, something like that  
11 or there is some aspect of interaction.

12           That's fine. But I just can't -- you can't just come in  
13 and say: Well, let's talk about this fellow's tax fraud  
14 because I just don't think -- it's going to be confusing. It  
15 is going to take up a huge amount of time. It's your view  
16 versus the Defendant's view.

17           And why am I going to ask the jury to adjudicate a case  
18 within a case? In other words, I think this is all just going  
19 to be too much of a distraction except for a little table  
20 setting. You can certainly use his name, you know, background,  
21 whatever, but anything more than that seems too much for me.

22           **MR. BOURGET:** Sure. I mean, our intention is not to  
23 have a mini trial. And in our response we state very plainly  
24 that we don't plan to bring in evidence that Mr. Brockman was  
25 indicted or committed tax fraud or anything related to that.

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1 I mean, the way you put it, table setting, that's what we  
2 are doing. Mr. Brockman and Mr. Smith met in the '90s, and  
3 Mr. Brockman referred Mr. Smith to Carlos Kepke because  
4 Mr. Kepke in the early '80s had established a foreign trust for  
5 Mr. Brockman.

6 So the -- I mean, there is sort of two points for why we  
7 are trying to bring in some of this evidence, and the first is  
8 to just add some context to the story.

9 **THE COURT:** Well, that's fine. If that's all you are  
10 going to do, I think that's okay. I had a sense that you  
11 wanted to do a lot more about this, what is it, the AEBCT trust  
12 and how that was illegal; and we are not going to do that.

13 If you are just talking about here is how everybody got to  
14 know each other, Defendant, I don't see any problem with that.

15 **MS. EWALD:** Yes, Your Honor --

16 **THE COURT:** Sorry. You are Ms.?

17 **MS. EWALD:** I'm Ms. Ewald for Mr. Kepke. Yes,  
18 Your Honor. Our reading of the Government's papers is that it  
19 will not be going into -- has agreed not to go into the  
20 extensive fraud, and we do believe a little bit of table  
21 sitting would be helpful for the jury.

22 We want to be sure that we really stick with the line and  
23 make sure we are not going into what we view as prejudicial  
24 evidence about a completely separate event.

25 **THE COURT:** Okay, I think we are all in agreement.

1           **MR. BOURGET:** Can I just add something just so  
2 everything is abundantly clear?

3           So the second reason we want to bring this in is because  
4 we do think it is somewhat probative of the element and to  
5 prove our element of willfulness, that this was -- the fact  
6 that Mr. Kepke for several decades was establishing these types  
7 of trusts; advertised it on his website, that that's all he did  
8 and that comes up in the undercover evidence that we will be  
9 addressing today -- there is some probativeness.

10          It is table setting, but there is also -- you know, we are  
11 hoping that it will help show that what Mr. Kepke did for  
12 Mr. Smith and the type of trust that he set up is not a  
13 one-off.

14          That's not to say that we are going to say that the trust  
15 that he set up for Mr. Brockman in the early '80s was a sham,  
16 but we are effectively saying that this was not Mr. Kepke's  
17 first time setting up one of these.

18          **THE COURT:** Well, there is nothing illegal about  
19 setting up trusts. So, I don't see how mentioning Brockman  
20 necessarily goes to his willfulness in violating -- willfulness  
21 and using offshore structures to evade federal income tax.

22          **MR. BOURGET:** I think it would be to essentially  
23 pre-empt any potential defense where Mr. Kepke, you know,  
24 claims that this was, you know, a mistake or a misreading of  
25 the law regarding foreign trusts.

## PROCEEDINGS

1           **THE COURT:** Well, this is the problem I'm having. In  
2 order for you to do that, you are necessarily going to have to  
3 show that the Brockman trusts were illegal and we are not going  
4 to do that.

5           You can't -- the fact that Kepke and Brockman had a trust,  
6 that doesn't mean anything unless you show that that trust was  
7 illegal. We are not going to do that. I'm not going to have a  
8 trial about whether a dead Defendant's trust was illegal or  
9 not. That's not going to happen.

10           **MR. BOURGET:** Again, that is not our --

11           **THE COURT:** I think that defeats everything you are  
12 saying. It doesn't go to willfulness at all because in order  
13 for it to be willfulness, it has to be a knowing violation or  
14 knowing effort to avoid federal or evade federal tax liability.

15           So I'm not going to let you stand up and say: Oh,  
16 Mr. Brockman had a trust that shows you that Mr. Kepke knew  
17 what he was doing is illegal. Absolutely not.

18           **MR. BOURGET:** For example, so the Defense's proposed  
19 expert -- and what we can glean from the disclosures -- you  
20 know, seems to suggest that, you know, there could be a  
21 good-faith misunderstanding of where the line is in terms of  
22 these trusts. And by bringing in evidence that Mr. Kepke has  
23 established these trusts in the past as far back as the early  
24 '80s, this was not a -- you know, he where the line was. He  
25 knew what the laws were.

## PROCEEDINGS

1           **THE COURT:** You can't show that without showing that  
2 the Brockman trust was -- was it Brockman? Brockman. You  
3 can't show that without showing the Brockman trust was illegal,  
4 and we are not doing that.

5           So you can do the table setting and the relationships and  
6 so on, but -- I mean, I will listen to the evidence; but I just  
7 want to tell you now, you will not be allowed to say the  
8 Brockman trust, you should treat that, ladies and gentlemen of  
9 the jury, as evidence of willfulness because it's not; and we  
10 are not going to get to the point that it ever will be.

11           In order for you to establish that point, you would have  
12 to put the Brockman trust on trial. We are just not going to  
13 do that. It is a 403 exclusion. It is of minimal relevance  
14 and it is maximally confusing and it's going to eat up a ton of  
15 time and it's going to confuse the jury. So that's the  
16 disposition for that. Are you okay with that, Defendant?

17           **MS. EWALD:** Yes, Your Honor, thank you.

18           **THE COURT:** All right. Let's move onto undercover. I  
19 have doubts about this, Government. I just -- first of all, I  
20 don't know. I mean, it looks like you got just tons of  
21 materials, and I can't really tell what it is specifically you  
22 want to get in.

23           I will just tell you I'm -- I'm probably okay if you have  
24 statements by Kepke that would be probative of his knowing that  
25 these offshore trusts or offshore structures were intended to



## PROCEEDINGS

1 evade federal income tax laws.

2 So if he said something to one of these undercover agents  
3 to the effect of, you know -- I'm just making this up -- "I can  
4 cover this money up for you" or "I do this all the time so you  
5 don't have to pay taxes," that I think is probably within the  
6 ballpark of consideration; but, you know, the rest of this just  
7 seems like it's not -- not admissible. Anyway, that's what --  
8 that's what I'm leaning towards.

9 **MR. PITMAN:** So I think the fundamental issue really  
10 at this point is that we haven't done a good enough job  
11 identifying this precise evidence that we are interested in  
12 using at trial.

13 So what I would propose to Your Honor is that on the same  
14 schedule that you have given to the Defense to supplement their  
15 expert disclosures, that the Government make a complete and  
16 fulsome disclosure to the Defense by next Friday of exactly  
17 what evidence from the undercover we expect to use.

18 Hopefully, given the guidance the Court has just provided,  
19 we are able to reach stipulations with respect to some of it.  
20 And if any of it is disputed, maybe it is something we can  
21 bring to the Court at the pretrial conference.

22 **THE COURT:** I think that's fair. Are you okay with  
23 that, Mr. Fondo?

24 **MR. FONDO:** Your Honor, the only thing I would say is  
25 we would like to try to get these issues resolved. There is a

## PROCEEDINGS

1 ton of information that the Government is talking about.

2 And so we appreciate the clarification. We think that's  
3 helpful, but we also obviously have very significant concerns  
4 about this; and this is significant evidence and we believe  
5 significantly prejudicial. And so we would like to tee that  
6 issue up before if possible.

7 **THE COURT:** Before what?

8 **MR. FONDO:** Before the pretrial conference,  
9 Your Honor.

10 **THE COURT:** Oh, I think we will have to do that then.  
11 You are not going to get this for a week. That's already  
12 October 30th, 28th, something like that. I'm -- you are coming  
13 in again on the 17th?

14 **MR. FONDO:** Twenty-first, I believe, 21st, yeah.

15 **THE COURT:** Twenty-first, that's as fast as I can do.

16 **MR. FONDO:** All right, Your Honor.

17 **THE COURT:** But I really -- I mean, I -- my tentative  
18 is I don't think anything is going to come in unless it is  
19 indicative of Mr. Kepke indicating through a statement or  
20 something some communicative act that he knew that these  
21 offshore trusts were intended to evade federal income tax;  
22 okay.

23 You can shelter money. You know, you understand the  
24 difference. You-all know this better than I do. It's fine to  
25 shelter money. There is nothing illegal about it. It has to

## PROCEEDINGS

1 be to evade. That's why I keep using that word.

2 So anything short of that, I don't think you are going to  
3 be able to get in, Government. Just think it over. I don't  
4 know what the specifics are obviously, but that's how I'm  
5 leaning.

6 You are going to give that to the Defendants by the same  
7 date as they give you the expert, Mr. Read, things.

8 Okay. Motion to compel proffer materials and statements  
9 and I -- Defendants, I don't really know -- what is it that you  
10 think you didn't get? It looks like you got a lot of stuff.  
11 So, what is it you did not get in your view?

12 **MR. STRASSBERG:** Thank you, Your Honor, Rich  
13 Strassberg for Goodwin. I know we are changing our speaker on  
14 you.

15 We didn't get, what I would submit to Your Honor, are the  
16 core materials that are exculpatory that are what is necessary.

17 So specifically we didn't get the presentation materials  
18 that were provided by Smith's counsel during the time when they  
19 were claiming and Smith was claiming "I did not commit tax  
20 fraud."

21 And that's why all of this is exculpatory. So we didn't  
22 get the materials they provided to the Government. We are  
23 aware they provided materials to the Government because in the  
24 summary letter the Government provided to us, it quotes from --  
25 at different times, it quotes from passages of materials that

## PROCEEDINGS

1 must have been given by the attorneys since it talks about the  
2 attorneys in the first person.

3 In addition, they have shown us exhibits that were  
4 attached to presentations that were provided and, you know,  
5 selected ones but not the presentations themselves.

6 Similarly, they would have to be Government notes of the  
7 actual words that were said at these presentations when Smith  
8 was making the exculpatory statements through his lawyers where  
9 he said "I didn't commit tax fraud and not only did I not" --  
10 within that "I didn't do that with Carlos Kepke" and that's --  
11 the charges are: Did Carlos Kepke aid him in committing tax  
12 fraud?

13 So this one is --

14 **THE COURT:** Well, what dates are these?

15 **MR. STRASSBERG:** Well, it is a good question,  
16 Your Honor. We don't know that we know all of them. What we  
17 have seen from the discovery that there were at least three  
18 presentations that Smith's lawyers made; April 12th of 2017,  
19 January 14th of 2019, and September 13th of 2019.

20 Now, there may be others but those are the ones where we  
21 see --

22 **THE COURT:** So you think you didn't get everything for  
23 those three. Is that what you are saying?

24 **MR. STRASSBERG:** That's right. And if there were  
25 others -- the focus is on the times when he is saying "I did

1 not do it," so it is exculpatory.

2 What the Government has given us -- and we don't take  
3 qualms with them having given us a lot of stuff. In fact,  
4 there is mountains of discovery in the case -- but it is very  
5 interesting. They gave us their memoranda about the times when  
6 Smith's lawyers come in and say "He wants to cooperate. He is  
7 going to tell you now he did do it."

8 And they have given us the memoranda of when he does say  
9 "I did it;" right. But those things are the inculpatory pieces  
10 that the Government likes.

11 Under *Brady* and its progeny, you have to give us the  
12 exculpatory material, and that's when he was saying he didn't  
13 do it, and those are what we are after.

14 So, both the presentations, Your Honor, but also their  
15 notes of those presentations. And we submit that really there  
16 is not -- everyone points to the law -- the same law, and they  
17 all say you have to turn this over.

18 The Government says: Well, no, this is really plea  
19 negotiations. And we submit that that's -- that the record  
20 doesn't support that characterization.

21 They have given us a 29-page letter, single spaced, 184  
22 paragraphs, of what they admit are factual statements that were  
23 made in these meetings; but they have done it in a way that  
24 really makes it very challenging to do -- to use it in  
25 cross-examination. There is no dates.

## PROCEEDINGS

1       They combine -- it appears they combine the meetings when  
2 they were saying "we didn't do it" with the one meeting where  
3 they said: "Okay, now he is willing to cooperate. He will  
4 tell you what he did do."

5       It is very confusing. Within that you see many  
6 exculpatory statements.

7               **THE COURT:** Mr. Bourget?

8               **MR. BOURGET:** Your Honor, so like Defense said, we  
9 provided MOIs, memorandum of interview, from every time that  
10 the Government spoke with Mr. Smith.

11       So, the meetings that the Defense is referring to,  
12 Mr. Smith was not at these meetings. They were not even  
13 attorney proffers where an attorney --

14               **THE COURT:** I just want to make sure I understand.

15       So, on the April 2017 and January and September 2019  
16 meetings that your colleague here mentioned, Mr. Smith was not  
17 present?

18               **MR. BOURGET:** No, I was not -- at those meetings it is  
19 my understanding that he was not.

20               **THE COURT:** Okay. And what did you provide to the  
21 Defendant for those three meetings?

22               **MR. BOURGET:** So those were plea negotiation meetings.  
23 That's the distinction that we are drawing is that there is a  
24 difference from when a defense attorney sits down with the  
25 Government and talks to the Government about what their client

## PROCEEDINGS

1 is most likely to testify about, what the statements they are  
2 likely to say. Those are the proffers that -- where there is  
3 memorandums of interview including ones for one meeting  
4 where -- on June 2nd, 2020, where Mr. Smith was not present at  
5 the meeting. That was an attorney proffer with the Government.

6 **THE COURT:** Well, I think we are only talking about  
7 one meeting in 2017 and two in 2019 right now.

8 So, okay, Mr. Smith wasn't present at those meetings; and  
9 those meetings were officially denominated plea discussions  
10 between Mr. Smith's lawyers and the Government?

11 **MR. BOURGET:** Yes. And so what we did provide from  
12 those meetings is that out of the materials that were presented  
13 from Mr. Smith's attorneys, we went through and pulled out all  
14 of the factual characterizations, all of the facts that were  
15 presented to us. And we put that in the letter. There is a  
16 significant overlap between what is in that letter and what is  
17 in --

18 **THE COURT:** Why not just -- okay, so why not just  
19 produce redacted versions of those documents? And let them see  
20 if for themselves.

21 **MR. BOURGET:** Well, at the time we figured putting it  
22 into a letter made the most sense.

23 **THE COURT:** Well --

24 **MR. BOURGET:** What we are protecting here is --  
25 obviously we have defense attorneys that come in and proffer

## PROCEEDINGS

1 regularly that come and negotiate with the Government. And  
2 part of the interest that we are trying to protect is being  
3 able to encourage defense attorneys to come in and be candid  
4 and not worry about their legal theories, their opinions about  
5 the case being turned over in discovery in another case.

6 **THE COURT:** I appreciate all of that. You did give a  
7 letter describing the facts, which you thought -- just give  
8 them the documents that you base the letter on that you already  
9 disclosed. Just redact the -- if you want to make redactions,  
10 redact it and then do a privilege log.

11 **MR. BOURGET:** Well, one thing that the Defense  
12 mentions in their brief is more information about the dates.  
13 If that's the information that they are really after is to get  
14 a sense of the dates --

15 **THE COURT:** Well, no. They want to hear why Robert  
16 Smith -- I'm just assuming. I don't know. I'm just  
17 channeling -- Robert Smith at some point, the first thing he  
18 said out of the gate was "You got the wrong man. I'm innocent  
19 and here is why."

20 They want to know that, I guess, so they can cross-examine  
21 him; and you said you have the proffer facts for that you have  
22 already summarized in the letter.

23 What is the problem with just redacting -- you know, cite  
24 the letter. Just give them the document the letter is based  
25 on. You can redact it if you want, and you can tell me why and



## PROCEEDINGS

1 tell the other side why you redacted it in a log.

2 **MR. BOURGET:** Sure. Candidly, Your Honor, I think our  
3 position at the time was that it would be less cumbersome to  
4 pull out those factual representations in the materials than to  
5 have somebody go through and redact --

6 **THE COURT:** Cumbersome is not a concept for  
7 withholding materials.

8 **MR. BOURGET:** I understand, but if --

9 **THE COURT:** How much time do you need to do this?

10 **MR. BOURGET:** A couple weeks, Your Honor.

11 **THE COURT:** That can't be right. I mean, the letter  
12 isn't that long. You are just going to pull out -- it should  
13 be easy as pie. Someone wrote the summary. It is only 29  
14 pages long. How can it take a couple weeks to get the  
15 underlying documents redacted?

16 **MR. BOURGET:** Well, I think what would be difficult in  
17 this case too is trying to -- it is not as if these  
18 presentations are: Here is our legal theory and opinion and  
19 here is the factual representation. I think it would take  
20 quite a bit of review to --

21 **THE COURT:** Well, trial starts in a month. So, what  
22 are you going to do about it? I mean, you probably should have  
23 produced these already, so --

24 **MR. STRASSBERG:** Your Honor, it might be helpful  
25 because what I'm hearing Counsel say, suggest, that we are

## PROCEEDINGS

1 going to have a problem if they are trying to just -- the  
2 lawyers come in as Mr. Smith's authorized representatives  
3 making admissions on his behalf and say not "let's talk about  
4 the guideline range" or "let's talk about plea negotiations; if  
5 you give us -- we will do a conspiracy but not a substantive  
6 count."

7 They come in and say: You have it wrong. He didn't do  
8 this. And let's tell you why. And then they tell them why and  
9 they go through: Well, he didn't believe it is a tax case. If  
10 he doesn't believe, he hasn't committed the crime. He didn't  
11 believe it was this type of tax thing, and he didn't believe it  
12 was that type of tax thing.

13 If they are going to say -- they are going to redact he  
14 didn't believe and then redact it all out because they say it's  
15 legal, that gets us nowhere.

16 **THE COURT:** No. Whatever fact is in the letter, you  
17 have to produce the underlying document. You know it is  
18 possible -- I'm just guessing -- but it is possible he came in  
19 and said: "Look, I was relying on this Kepke lawyer and he led  
20 me down the garden path."

21 Are you sure -- you are prepared for that?

22 **MR. STRASSBERG:** Yeah, the summary letter indicates  
23 that's not the nature of it.

24 **THE COURT:** All right.

25 **MR. STRASSBERG:** It indicates there is a lot of fact.

## PROCEEDINGS

1 My only point is that in a case where they are claiming  
2 about -- a tax case there is willfulness and they are saying he  
3 didn't do it and let us explain why, there isn't a distinction  
4 between law and facts.

5 And I would submit that doesn't matter under the law  
6 anyway. There isn't one. I don't think there is anything they  
7 can redact in the presentations that would be appropriate.  
8 There is no privilege. The lawyers were making it to the  
9 Government. I mean, you know, on --

10 **THE COURT:** That may be. Let's just do it that way.  
11 You have got a week. It shouldn't be that hard to do. Let's  
12 all -- what did I say, a week from Friday for all this stuff?

13 **MR. STRASSBERG:** Yes, Your Honor.

14 **THE COURT:** Let's do that too. Okay. Does that take  
15 care of the motion --

16 **MR. STRASSBERG:** I think the only other part of that  
17 but maybe -- you know, because Your Honor has been right on, on  
18 this issue -- we had also requested their notes of the meeting,  
19 and we have cited to the Ninth Circuit law that says if you  
20 give a summary but that summary is -- it leaves out some  
21 exculpatory parts of what the notes show, then you risk  
22 reversal. I don't think anyone wants reversal in this case.  
23 And we've said: Give us the underlying presentations, as we've  
24 been talking about; give us --

25 **THE COURT:** Are you talking about the Justice

## PROCEEDINGS

1 Department lawyers' notes? What are you talking about, what  
2 notes?

3 **MR. STRASSBERG:** Well, I don't know if there would be  
4 an agent. Typically there is either a memorandum created and  
5 so there may be the memorandum -- I refer to it as notes -- it  
6 could be a memorandum of these meetings. It is very typical or  
7 it could be notes if there was no memorandum created.

8 **THE COURT:** Here is the thing: Look, I really prefer  
9 to know exactly what we are talking about so I would like a  
10 log; okay. Whatever your grounds for withholding it, just put  
11 it in a log and we will do a stage 2. I just can't do it --

12 **MR. STRASSBERG:** That makes sense, Your Honor.

13 **THE COURT:** It is too amorphous. You know what to do  
14 with the disclosures. If you are going to hold anything back,  
15 put it on a log. You know, make it like a privilege log. All  
16 right. Only you don't have to say "attorney-client." You can  
17 just put an explanation.

18 **MR. BOURGET:** Understood.

19 **THE COURT:** All right. Now, okay. Last one, last  
20 binder. Okay, Classified Information Procedures Act.

21 I spent a lot of time thinking about this because I was a  
22 little mystified about why we are even looking at it. As far  
23 as I can tell, there is no classified information in the case.

24 My reading of the CIPA, Classified Information Procedures  
25 Act, is it's procedural for one thing. It doesn't grant any

## PROCEEDINGS

1 substantive rights, one way or the other. It certainly is not  
2 a discovery statute. It is not a Rule 16. It is not a *Brady*,  
3 you know, disclosure statute.

4 It just says: Once the Government has determined -- the  
5 Government has determined that there is classified information  
6 and provided it to Defendant and the Defendant wants to use it  
7 in court, what do you do to protect the information.

8 I mean, that's not all the statute but that's basically  
9 the heart of it. I don't -- I mean, is there any -- did I miss  
10 something? Is there some classified information in the case?

11 **MR. PITMAN:** I have nothing to add to the Court's  
12 analysis.

13 **MR. FONDO:** Your Honor, may I?

14 **THE COURT:** I don't know what it is. Why are we even  
15 looking at this?

16 **MR. PITMAN:** Sorry, if we are going to discuss the  
17 substance of the motion, I think we probably have to clear the  
18 courtroom because the pleadings are under seal and I think they  
19 should be.

20 **THE COURT:** Oh, okay. Sorry, everyone. There is no  
21 classified information; but just to be safe, I'm going to have  
22 to ask everybody to leave. I apologize.

23 (Pause in proceedings.)

24 (The following pages 38 through 68 were placed under  
25 seal by Order of the Court:)



















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## SEALED PROCEEDINGS

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## SEALED PROCEEDINGS

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(Proceedings adjourned at 3:38 p.m.)

---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Sunday, October 23, 2022

A handwritten signature in blue ink that reads "Marla Knox". The signature is written in a cursive style and is positioned above a horizontal line.

Marla F. Knox, CSR No. 14421, RPR, CRR, RMR  
United States District Court - Official Reporter